No. 75-636

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1975

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, PETITIONER

v.

UNITED STATES OF AMERICA AND
THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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Petitioner contends that there is an "additional conflict" (Supp. Pet. 1) among the circuits as a result of the recent decision of the United States Court of Appeals for the Fourth Circuit in *Patterson* v. *American Tobacco Co.*, Nos. 75-1259 to 75-1263, decided February 23, 1976 (Supp. Pet. App. 1-46). We submit that not only is there no conflict between *Patterson* and the decision below but, on the contrary, *Patterson* reaffirms the adherence of the courts of appeals to the "rightful place" doctrine of seniority relief—a doctrine that was ratified by Congress in adopting the 1972 amendments to Title VII of the Civil Rights Act of 1964 and has recently been approved by this Court. See *Franks* v. *Bowman Transportation Co.*, No. 74-728, decided March 24, 1976, slip op. 15-17 and n. 21.

Petitioner asserts that the decision below is inconsistent with *Patterson* in two respects: first, that the relief granted here was broader than that permitted in *Patterson* (Supp. Pet. 1-2); and second, that the displacement of incumbent employees was required here but disapproved in Patterson (*id.* at 2-4). Neither contention is correct.

1. *Patterson* involved a company with two plants, Virginia and Richmond, each of which had a fabrication department and a prefabrication department. The evidence showed that black employees had been denied entry into the higher-paying jobs of the fabrication departments in each plant and that the effects of this discrimination were perpetuated by company rules that prevented employees from transferring their company seniority from one plant to the other. Thus, as the court of appeals noted (Supp. Pet. App. 16-17):

> [U]nder the present method of job assignments, a black employee hired in 1955 at the Richmond branch prefabrication department has no realistic opportunity to secure a higher paying job in the formerly white Virginia fabrication department because he cannot transfer his company seniority to the Virginia branch. If he seeks a new job there, he must forfeit his seniority and start as a new hire.

To remedy this discrimination, the district court in *Patterson* had ordered a single seniority roster for the two plants to enable employees in each plant to bid freely for posted jobs in the other. Although the court of appeals reversed the order of the district court insofar as it had authorized transfers with full seniority benefits in situations where there had been no past discrimination (*e.g.*, transfers by white employees or transfers

by black employees to prefabrication jobs), the Fourth Circuit upheld the grant of relief insofar as it had required that black employees assigned to the traditionally black prefabrication jobs be given the right to move with full plant seniority to jobs in the traditionally white fabrication department (Supp. Pet. App. 17-18).

Similarly, in the present case the class afforded relief was confined to those black and Spanish-surnamed employees who were initially assigned to city, dock and shop jobs prior to March 1971, at a time when their race or national origin barred them from over-the-road employment (Pet. App. 62). Under the court's decision, however, such employees were not allowed to transfer with full seniority rights to city, dock or shop jobs (from which they had never been excluded), but were limited to one transfer with seniority to traditionally all-white job classifications (Pet. App. 34-35). Thus, both the Fourth Circuit in *Patterson* and the Fifth Circuit in this case limited relief to the precise class of employees that had been harmed by the company's discriminatory assignment policies and to the precise situations in which that discrimination had occurred in the past.

2. Nor is there any conflict between the approach of *Patterson* and the decision below with respect to "bumping"—that is, the displacement of incumbent employees. In *Patterson*, the district court had required the company to promote qualified blacks with seniority into jobs presently held by whites and thus to displace (or "bump") the white employees from those jobs (Supp. Pet. App. 21-22). This decision departed from the generally accepted "rightful place" doctrine that has been adopted without exception by the courts of appeals (*id.* at 22-23). In reversing the district court, the Fourth Circuit adhered to the accepted principles, quoting with approval the language

of the Fifth Circuit in *Local 189, United Papermakers and Paperworkers* v. *United States*, 416 F.2d 980, 988, certiorari denied, 397 U.S. 919, that "[w]hite incumbent workers should not be bumped out of their *present* positions by Negroes with greater plant seniority" (*id.* at 22-23; emphasis in original).

The court of appeals here adhered to the same principles, relying upon the identical language quoted by the Fourth Circuit in *Patterson* (Pet. App. 31). The decision below does not require the demotion or bumping of any employee out of a presently held job. Rather, the court expressly stated that minority employees granted seniority transfer rights by the district court are to exercise those rights only as vacancies occur (*ibid.*).[1]

3. Finally, we note that this Court's decision in *Franks* v. *Bowman Transportation Co., supra*, provides additional justification for the denial of the petition. In *Franks*, the Court held that Section 703(h) of Title VII, 42 U.S.C. 2000e-2(h), does not bar an award of seniority relief in circumstances where an illegal discriminatory act or practice has been proven, and emphasized, through a review of the legislative history of the 1972 amendments to Title VII, that Congress intended the courts to grant meaningful, "make-whole" relief in appropriate cases—including restoration of the victims of discrimination to their rightful place in the seniority system (slip op. 15; footnote omitted):

[1]While the court of appeals did provide that members of the affected class should be allowed to compete for future vacancies on the basis of plant (terminal) seniority with persons who were on lay-off status, the Fourth Circuit also has approved that remedy as necessarily within the "rightful place" doctrine. *United States* v. *Chesapeake and Ohio Railway Co.*, 471 F.2d 582 (C.A. 4), certiorari denied *sub nom. Local 268, Brotherhood of Railroad Trainmen* v. *United States*, 411 U.S. 939. The Fourth Circuit's repeated citation of, and reliance upon, *Chesapeake and Ohio Railway* in *Patterson* clearly indicates that there is no conflict between those decisions or between *Patterson* and the decision below.

> This [legislative history] is emphatic confirmation that federal courts are empowered to fashion such relief as the particular circumstances of a case may require to effect restitution, making whole insofar as possible the victims of racial discrimination in hiring. Adequate relief may well be denied in the absence of a seniority remedy slotting the victim in that position in the seniority system that would have been his had he been hired at the time of his application. It can hardly be questioned that ordinarily such relief will be necessary to achieve the "make-whole" purposes of the Act.

The principle of making whole the victims of the undisputed discrimination found here was, of course, the basis for the remedy authorized by the court of appeals.

For the foregoing reasons and those set forth in the Brief in Opposition, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General.

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General Counsel,
Equal Employment Opportunity Commission.

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